STATE OF NORTH CAROLINA	BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO N.C. GEN. STAT. § 115C-109.9
M.L., a minor, by his legal guardian, TIFFANY MUNGO, Petitioners, v. CHARLOTTE-MECKLENBURG SCHOOLS BOARD OF EDUCATION, Respondent.	**FINAL DECISION** 18 EDC 00624

This **DECISION** resolves Petitioners' May 31, 2018, appeal of the Final Decision Granting Summary Judgment issued in the above-captioned matter by Administrative Law Judge (ALJ) Selina Malherbe on May 1, 2018, and Respondent's June 18, 2018, Motion to Dismiss Appeal and Petition to State Review Officer.

Respondent's Motion to Dismiss Appeal and Petition to State Review Officer is **DENIED**, and ALJ Malherbe's Final Decision Granting Summary Judgment is **AFFIRMED**.

APPEARANCES:

For Petitioner-Appellants: Keith Howard, THE LAW OFFICES OF KEITH L. HOWARD, P.L.L.C., 19109 W. Catawba Ave., Ste. 200, Cornelius, NC 28031, keithh@khowardlaw.com.

For Respondent-Appellee: Christopher Campbell, CAMPBELL SHATLEY, P.L.L.C., 674 Merrimon Ave., Ste. 210, Asheville, NC 28804, chris@csedlaw.com.

THE RECORDS, received by the Undersigned on June 7, 2018, for review in connection with this appeal, include:

1. A letter signed by William J. Hussey, Director, Exceptional Children Division, and dated May 31, 2018, providing "formal notice of . . . appointment as State Hearing Review to review . . . 18 EDC 00624," the above-captioned case;

2. A "Certification" form indicating that "the attached (1 USB drive) [is] a true copy of the Official Record . . . in the case 18 EDC 00624;"

3. An "Official Record Index Sheet" captioned 18 EDC 00624;

4. A USB drive labeled with a sticker stating "18EDC00624 – ML by parent or guardian Tiffany Mungo v. Charlotte-Mecklenburg Schools Board of Ed," and affixed with a seal; and

5. A stack of paper duplicative of material also contained on the USB drive labeled with the case number, "18EDC00624," in this case.

The Undersigned subsequently received from the Department of Public Instruction via encrypted email on June 22, 2018, a copy of the **TRANSCRIPT** of the April 18, 2018, hearing in the above-captioned matter.

The Undersigned also received from the parties the following **PARTY SUBMISSIONS**:

1. From Petitioners, via email on June 14, 2018, Petitioners' Response to State Review Officer's Request for Written Arguments;

2. From Respondent, via email on June 15, 2018, Respondent/Appellee's Written Argument on Appeal;

3. From Respondent, via email on June 15, 2018, a copy of Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Attached Affidavit of Patrice Simon in Support of Motion to Dismiss filed in and submitted to the Office of Administrative Hearings that same day;

4. From Respondent, via email on June 18, 2018, Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer; and

5. From Petitioners, via email on June 28, 2018, Petitioners' Response in Opposition to Respondent's Motion to Dismiss Petition with attached Exhibits.

6. From Respondent via email on July 2, 2018, Respondent's Reply to Petitioner's Response to Respondent's Motion to Dismiss.

REFERENCES utilized to provide a document that does not contain personally identifiable information regarding the Petitioners and/or for convenience include the following:

For the Petitioner child:	M.L. or the child
For the Petitioner guardian:	T.M., Ms. Mungo, Mother, or Petitioner
For the Respondent:	Respondent or CMS

ISSUES ON APPEAL:

Petitioners' Notice of Appeal of Final Decision Granting Summary Judgment stated the matter for review as follows: "Appeal from the Final Decision Granting Summary Judgment entered herein on May 1, 2018, by the Honorable Judge Selina Malherbe in the above-captioned action."

Respondent's Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer offered a preliminary matter for review on appeal as follows: "[T]his matter is moot and neither the Office of Administrative Hearings nor the North Carolina Department of Public Instruction, by and through the State Review Office, have subject matter jurisdiction as a matter of law."

PRELIMINARY STATEMENT on the Standard of Review:

The undersigned's review of the findings and decisions subject to appeal is in accordance with the provisions of 20 U.S.C. § 1415(g), 34 C.F.R. § 300.514, N.C. Gen. Stat. § 115C-109.9, and North Carolina's *Policies Governing Services for Children with Disabilities*, NC Policies 1504-1.15.

Under these procedures, the Review Officer must render an "independent decision" following impartial review of the entire record, giving "due weight" to the administrative proceedings before the administrative law judge. *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982); *see also Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process).

The Fourth Circuit Court of Appeals interprets this "due weight" requirement to mean that "findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it." *Doyle*, 953 F.2d at 105; *see also J.P. v. County School Board of Hanover County*, 516 F.3d 254, 259 (4th Cir. 2008) ("In this circuit, we interpret *Rowley*'s 'due weight' requirement to mean that the findings of fact made in the state administrative proceedings must 'be considered *prima facie* correct.'" (citing *Doyle*, 953 F.2d at 105)).

To determine whether factual findings were "regularly made and entitled to *prima facie* correctness," *Doyle*, 953 F.2d at 105, "our cases have typically focused on the *process* through which the findings were made," *J.P.*, 516 F.3d at 259 (emphasis in original). Factual findings are *ir*regularly made "if they are reached through a process that is far from the accepted norm of a fact-finding process." *County School Board v. Z.P.*, 399 F.3d 298, 305 (4th Cir. 2005) (internal quotation marks omitted).

Findings of fact are not irregularly made simply because a hearing officer finds one party's witnesses to be more credible than another's on a disputed point. Review Officers "who . . . ha[ve] not seen or heard [witnesses] testify," generally must defer to ALJs, or hearing officers, on questions of credibility because "hearing officer[s] . . . *ha[ve]* seen and heard the witness[es] testify." *Doyle*, 953 F.2d at 104 (emphasis added).

Findings of fact may be irregularly made, however, if they are unsupported by an independent review of the record evidence considered in its entirety. *See Carlisle Area Sch. V. Scott*, 62 F.3d 520, 529-30 (3rd Cir. 1995).

In other words, the amount of deference appropriate in a particular case may vary depending upon the process employed to find the facts and the thoroughness of each finding. *See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). When determining the degree

of deference to be given a hearing officer's findings, a particularly important factor is the thoroughness with which they were reached.*Capistrano*, 59 F.3d at 891("The amount of deference accorded the hearing officer's findings increases where they are thorough and careful.'").

When a reviewing tribunal does not adhere to factual findings in the administrative proceeding, "it is obliged to explain why." ***M.M. v. School Dist. of Greenville County***, 303 F.3d 523 (4th Cir. 2002).

Now, having reviewed the records received in connection with this case, including the Certified Official Record, the Review Officer for the State Board of Education independently and impartially offers the following Findings of Fact in accordance with 20 U.S.C. § 1415(g), 34 C.FR § 300.514, N.C. Gen. Stat. § 115C-109.9, and the *Policies Governing Services for Children with Disabilities*, NC Policies1504-1.12:

FINDINGS OF FACT

This statement of factual findings offers relevant facts in three parts: (1) general background and procedural-history facts, (2) background facts pertinent to the first issue on appeal regarding Respondent's argument that this appeal and its underlying Petition is now moot, and (3) background facts pertinent to the Petitioners' appeal of the ALJ's Final Decision Granting Summary Judgment on the merits.

BACKGROUND AND PROCEDURAL-HISTORY FACTS:

1. Petitioner M.L. was born on March 4, 2011. He is now 7 years old, and he recently completed first grade.

2. In the 2016-2017 school year, when he was five years old, M.L. began kindergarten in the Charlotte-Mecklenburg Schools (Respondent) at Marie G. Davis Elementary. Mungo Affidavit 1 ¶ 6.

3. In the 2017-2018 school year, as a six-year-old, M.L. enrolled in Ashley Park PreK-8 School, also within the Charlotte-Mecklenburg Schools (Respondent) for first grade. Mungo Affidavit 1 ¶ 7.

4. M.L. experienced academic and behavioral challenges in school. Petitioner Ms. Mungo, M.L.'s mother, has been actively engaged at school and home to support her son in addressing those challenges.

5. The parties agree that M.L. made behavioral choices that required behavioral interventions in both kindergarten and first grade.

6. M.L. did not stay in his seat when he was expected to do so; he yelled at inappropriate times and in inappropriate manners; he punched, slapped, grabbed, kicked, elbowed, threw rocks at, spit upon, bullied, and made fun of other students and/or school employees, sometimes causing injuries; he used inappropriate language, including shouting "What the

F**k!" and "I'm going to suck your d**k!" on different occasions; he held up his middle finger; he "stole" papers and grabbed pencils; he ran in the school building and on the bus when running was in appropriate. *See* Mungo Affidavit 1 ¶¶ 24 & 33, Exhs. 4 – 7.

7. Respondent suspended M.L. *out of school* for six days in *kindergarten*. Bowman Affidavit ¶ 9.

8. Respondent more commonly responded to M.L.'s behavior through less formal means of correction such as contemporaneous reprimands or redirections, calling or texting his mother, sending him to another classroom within the school to "reset," requiring him to sit outside the classroom in the hallway, placing him with a behavior modification technician, principal, or school police officer, imposing silent lunches, taking away recess time, and holding restorative conversations. *See* Mungo Affidavit 1 ¶ 17 – 24 & 33; Patterson Affidavit ¶ 6; Jean Affidavit ¶ 10.

9. Respondent recorded at least 27 different behavioral incidents for M.L. in Kindergarten and at least 15 behavioral incidents for M.L. in the first half of first grade (through the date of the filing of the Petition at issue in this case). *See* Mungo Affidavit 1 ¶¶ 24 & 33.

10. Respondent asked a school psychologist to visit M.L.'s classroom at least twice to observe his behavior and offer suggestions about how his classroom teacher might more effectively support him in making behavioral improvements. *See* Mungo Affidavit 1, Exh. 8; Powell Affidavit ¶ 8.

11. Respondent's employees, including M.L.'s teachers, principal, a school counselor, and a school psychologist, did not "see any evidence of a cognitive impairment" or "need for specialized instruction," and none "express[ed] to the CMS Director of Special Education or other supervisory personnel a concern regarding a specific pattern of behavior demonstrated by M.L." *See* Patterson Affidavit ¶¶ 11& 14; Powell Affidavit ¶ 11; Bowman Affidavit ¶¶ 11 & 14; Gibson Affidavit ¶¶ 7 & 13; Hasan Affidavit ¶ 16; Jean Affidavit ¶ 16 & 19.

12. Petitioner Ms. Mungo, M.L.'s mother, by the end of his kindergarten year, was sufficiently concerned about M.L.'s behaviors and her belief that they were impacting his access to education, that she called M.L.'s pediatrician "for help," inquiring whether he needed medicine to assist him in "manag[ing] his behavior." Respondent's Supplemental Authority Re: Motion for Summary Judgment, Exh. B.

13. The parties agree that M.L. is generally a below-average performer in school, but they disagree about whether this performance is sufficient.

14. M.L.'s kindergarten teacher did not, at any time, believe M.L. had "any cognitive impairment" and reports that "M.L. made significant academic progress as follows:"

    a. "M.L. entered Kindergarten reading at level PC (Print Concepts) which level is below average for a typical student entering Kindergarten."

b. "By the end of the year, M.L. progressed to reading level RB (Reading Behaviors) on the TRC Literacy Test."
c. "By the end of the academic year, M.L. was 'progressing in' or had 'mastered' approximately 88% of the academic standards for Kindergarten. This performance put M.L. slightly below average for the performance of all students in the class."

Gibson Affidavit ¶ 6.

15. M.L.'s first-grade teacher also did not, at any time, believe M.L. had "any cognitive impairment" and represents that M.L. continued to make academic progress in her class. In reading, M.L.'s first-grade teacher reports that M.L. made more than one year's growth in only 6 months. In math, M.L.'s first-grade teacher reports that M.L. was performing at or above average for his classmates.

16. Ms. Mungo emphasizes that although Respondent characterizes M.L.'s performance as sufficient, his report cards, as she reads them, do not reflect overall progress or grade-level proficiency.

17. M.L.'s kindergarten General Outcome Learner "grades" were identified with the numbers 1, 2, or 3 with 1 meaning "rarely" observed, 2 meaning "sometimes" observed, and 3 meaning "consistently" observed.

18. M.L.'s kindergarten General Learner Outcomes were assessed in four quarters as follows:

General Learner Outcome	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Self-Directed Learner	1	1	1	1
Community Contributor	1	2	1	2
Complex Thinker	2	2	1	1
Quality Producer	2	2	2	2
Effective Communicator	1	2	1	1
Effective Use of Technology	2	2	1	1

Mungo Affidavit 1, Exh. 9.

19. M.L.'s kindergarten General Learner Outcome grades did not show progress. M.L. did not "consistently" perform any of General Learner Outcomes at any time during the year; M.L.'s numeric grades did not show improvement across the 4 quarters assessed on any of these outcomes; and M.L.'s grades showed declining progress on three of these outcomes – Complex Thinker, Effective Communicator, and Effective Use of Technology.

20. M.L.'s Academic Grade Report in kindergarten reported grades on a scale of 1 to 4 with 1 representing "not meeting grade level standards," 2 representing "progressing toward grade level standards," 3 representing "meeting grade level standards," and 4 representing "expands grade level standards."

21. M.L.'s kindergarten grades over four quarters were reported as follows:

Reading Standards for Literature	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Key Ideas & Details	2	1	1	2
Craft & Structure	2	2	3	3
Integration of Knowledge & Ideas	2	2	2	2
Range of Reading and Level of Text Complexity	2	2	1	2
Reading Standards for Informational Text	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Key Ideas and Details	2	1	1	2
Craft & Structure	2	2	3	3
Integration of Knowledge and Ideas	2	2	2	2
Range of Reading and Level of Text Complexity	2	2	1	1
Speaking & Listening	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Comprehension	2	2	2	2
Presentation of Knowledge & Ideas	2	2	2	2
Reading Standards: Foundational Skills	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Print Concepts	3	3	3	3
Phonological Awareness	1	2	2	2
Phonics & Word Recognition	2	2	1	2
Fluency	2	2	2	2
Writing Standards	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Text Types & Purposes	2	2	2	2
Production & Distribution of Writing	2	2	2	2
Research to Build and Present Knowledge	N/A	N/A	N/A	2
Language Standards	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Conventions of Standard English	2	2	1	2
Vocabulary Acquisition & Use	2	2	N/A	1
Kindergarten Social Studies	Quarter 1	Quarter 2	Quarter 3	Quarter 4
History	2	2	2	2
Geography & Envt Literacy	N/A	N/A	N/A	2

Economics & Financial Literacy	2	2	2	2
Civics & Gvt.	2	1	1	1
Culture	2	2	2	2
Kindergarten Science	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Physical Science	N/A	N/A	N/A	2
Earth Science	2	2	2	2
Life Science	2	2	2	2
Counting & Cardinality	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Knows number names & sequence	2	1	3	3
Counts to tell the # of objects	2	2	2	2
Compares #s	2	2	3	3
Operations & Algebraic Thinking	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Understands + & -	N/A	2	2	3
Number & Operations in Base Ten	Quarter 1	Quarter 2	Quarter 3	Quarter 4
#s 11 - 19	N/A	N/A	2	2
Measurements & Data	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Describes & compares measurable attributes	N/A	N/A	2	2
Classifies objects & counts the # in each class	2	3	3	3
Geometry	Quarter 1	Quarter 2	Quarter 3	Quarter 4
Identifies & describes shapes	2	2	N/A	2
Analyzes, compares, creates & composes shapes	N/A	N/A	N/A	2

Mungo Affidavit 1, Exh. 9.

22. These grades show progress in a few areas: Reading Craft & Structure, Phonological Awareness, Knowing Number Names and Sequences, Comparing Numbers, Understanding Addition and Subtraction Concepts, and Classifying Objects and Counting the Number of Objects in Each Class.

23. But in the final quarter of his kindergarten year, M.L. met grade-level expectations (earning at least a 3) in fewer than 20% of the graded categories (7 of 26).

24. Shortly before kindergarten began, in November 2015, Ms. Mungo visited M.L.'s pediatrician to discuss "behavior problems." The pediatrician's notes reflect that, at that time, M.L.'s grandmother felt as if M.L. had a "behavioral issue," but Ms. Mungo expressed that she felt "like he is a normal 4-year-old" who is "just spoiled." *See* Respondent's Supplemental Authority Re: Motion for Summary Judgment, Exh. B.

25. Just after the start of kindergarten, in October 2016, Ms. Mungo visited M.L.'s pediatrician again to discuss a "behavior problem," and the resulting treatment plan noted: "Hx is consistent with spoiled child." The pediatrician's notes reflect that the pediatrician discussed with Ms. Mungo "behavior management – using positive and negative

reinforcements [with] consistency" and a "referral to psychologist if symptoms persist." *See* Respondent's Respondent's Supplemental Authority Re: Motion for Summary Judgment, Exh. B.

26. Toward the end of M.L.'s kindergarten year, in late April 2017, Ms. Mungo phoned M.L.'s doctor and, according to the notes in the pediatrician's file:

> "state[ed that] she is frustrated over [M.L.'s] behavior at school and she does not know what to do. She state[ed] she is reaching out for help. She state[ed] that he will have days that he does not listen. He is up out of his seat, and can even be disrespectful to the teacher. He won't stay in his seat and focus on his work. Mother state[ed] that she had previously talked with Dr Aster and [M.L.] is no longer hitting other students. Mother state[ed] she is not sure if he needs to be on medicine to help manage his behavior."
> *See* Respondent's Supplemental Authority Re: Motion for Summary Judgment, Exh. B.

27. Following this late April 2017 phone call, M.L.'s pediatrician indicated that she "may need to evaluate for possible ADHD," and she asked Ms. Mungo to pick up some forms to assist in that evaluation. *See* Respondent's Supplemental Authority Re: Motion for Summary Judgment, Exh. B.

28. In May 2017, Ms. Mungo told M.L.'s classroom teacher at the time (Ms. Gibson) that M.L. was being evaluated by his pediatrician, and she asked M.L.'s classroom teacher, Ms. Gibson, to fill out a Vanderbilt rating scale, one of the forms provided to her by M.L.'s pediatrician for consideration in making the ADHD diagnosis. Ms. Gibson filled out that form, discussed it with Ms. Mungo, and returned it to Ms. Mungo. *See* Gibson Affidavit ¶ 15.

29. On June 5, 2017, at the close of M.L.'s kindergarten year, M.L.'s doctor diagnosed him with ADHD.

30. Petitioners did not share this diagnosis with M.L.'s teachers or school. *See* Hasan Affidavit, Exh. B.

31. Petitioners did not request that M.L.'s school conduct an evaluation of M.L. or consider him for special education and related services until after this Petitioner for Contested Case was filed. *See* Hasan Affidavit, Exh. B.

32. M.L. began first grade at a new school, Ashley Park PreK-8 School, in August 2017 without disclosing his diagnosed disability. *See* Paragraphs 8 – 10 & 15; *see also* Mungo Affidavit 1 ¶¶ 29 – 30 & 33. His first-grade teacher reported academic growth and continued to work with him on behavioral challenges in the new setting. Jean Affidavit ¶¶ 7 – 12.

33. On February 1, 2018, Petitioners filed a Petition for a Contested Case Hearing, alleging that Respondent (Charlotte-Mecklenburg Schools or CMS) violated its Child Find obligations under the IDEA with respect to Petitioner M.L. and thus failed to identify M.L. as a child with a disability eligible for special education and related services under the IDEA and an IEP that would offer M.L. a FAPE in the LRE.

34. On February 1, 2018, counsel for Petitioners, Keith Howard, filed a Notice of Appearance.

35. On February 2, 2018, the Honorable Administrative Law Judge [ALJ] Stacey Bice Bawtinhimer filed and served a Notice of Contested Case, Assignment, and Order, informing the parties that the case had been assigned to her, requesting Respondent to inform the Chief Hearings Clerk of the Office of Administrative Hearings [OAH] if it had not been served with the Petition, and requesting any attorneys in the case to file Notices of Appearance.

36. On February 6, 2018, Respondent received ALJ Bawtinhimer's Notice of Contested Case, Assignment, and Order and informed OAH that it had "not been served with the Petition." *See* Email from Gen Sandoval, Legal Assistant, Charlotte-Mecklenburg Schools, dated February 6, 2018, 4:40 p.m., to Maria Erwin, Chief Hearings Clerk, Office of Administrative Hearings.

37. On February 9, 2018, counsel for Respondent, Christopher Z. Campbell, filed a Notice of Appearance.

38. On February 13, 2018, ALJ Bawtinhimer entered an Order Setting Hearing and General Pre-Hearing Order that, *inter alia*, (1) established February 13, 2018, as the date of service upon Respondent[1] and (2) set the hearing on the Petition to begin on March 28 – March 29, 2018 at 10:00.

39. On February 14, 2018, "[b]oth the Petitioner and Respondent agree[d] to . . . waive a resolution meeting and participate in mediation."

40. On February 16, 2018, Petitioners and Respondent filed a Joint Motion to Continue Hearing, citing mediation scheduled on March 16, 2018.

41. On February 16, 2018, ALJ Bawtinhimer granted the parties' Joint Motion to Continue Hearing and entered an Order Continuing Hearing and for Consent Scheduling Order, requiring the parties to submit a consent scheduling order on or before March 19, 2018, "[i]f this matter does not settle at mediation."

42. On February 19, 2018, the Honorable Chief Administrative Law Judge Julian Mann III entered an Order of Reassignment establishing that "[f]or good cause shown, it is hereby

[1] Also on February 13, 2018, ALJ Bawtinhimer entered a separate Order requiring that the parties "TAKE NOTICE . . . that the Respondent will be served by separate e-mail the Petition for a Contested Case Hearing (due process complaint) and as such the Respondent has now received notice of the parent's due process complaint in this matter."

ordered that Selina Malherbe, Administrative Law Judge, is assigned to preside in any further proceedings herein."

43. On February 22, 2018, Ms. Mungo sent an email to M.L.'s school principal and requested that M.L. "receive an expedited evaluation for special education services" because she was "worried that [M.L.] is not doing well in school academically, behaviorally, or socially and believe[d] he may need special education services to be a successful student." Hasan Affidavit, Exh. A.

44. On February 23, 2018, Respondent filed and served its Response to Petition for Contested Case Hearing denying the essential allegations of the Petition for Contested Case Hearing and asserting Affirmative Defenses.

45. On March 9, 2018, Respondent held a meeting in response to Ms. Mungo's request for an expedited evaluation; the notes from that meeting indicate that Ms. Mungo stated that M.L. did *not* have a medical diagnosis and that she had no evaluation information for consideration in that context. Hasan Affidavit, ¶ 9 & Exh. B.

46. At the March 9, 2018, meeting, Respondent agreed to evaluate M.L. for purposes of determining whether he might have a disability rendering him eligible for special education and related services. Hasan Affidavit, Exh. B.

47. On March 29, 2018, Petitioners filed a Motion for Payment of Expert Witnesses and Fees along with a proposed order that would, if entered, grant that motion.

48. On April 2, 2018, Respondent filed a Motion in Limine seeking to preclude Petitioners from introducing evidence, testimony, or argument for any relief relating to allegations "that M.L. has not been identified, evaluated, and/or provided a Free and Appropriate Public Education from the date of this ***Petition*** through the conclusion of this matter."

49. On April 2, 2018, Respondent also filed a Motion and Memorandum of Law in Support of Summary Judgment.

50. On April 2, 2018, Petitioners filed Petitioners' Motion to Continue "request[ing] to have the hearing rescheduled to a date on or after May 14, 2018, to give [Petitioners] time to identify additional witnesses, particularly expert witnesses, for the hearing."

51. On April 10, 2018, ALJ Malherbe took two actions in this case: (1) She entered a Notice of Hearing on Respondent's Motions, including Respondent's Motion for Summary Judgment, setting a hearing on those motions on April 18, 2018, and (2) she entered a Notice of Hearing on Petitioners' Petition for a Contested Case Hearing, setting it for hearing on May 22 – 25, 2018, and May 29, 2018.

52. On April 16, 2018, Attorney Stephenson F. Harvey, Jr., filed a Motion by Out-of-State Attorney to Practice before the Office of Administrative Hearing, requesting *pro hoc vice* admission to appear in this matter on behalf of Petitioners.

53. Also on April 16, 2018, Respondent filed Supplemental Authority Re: Motion for Summary Judgment, attaching the Affidavit of Brenda Hasan.

54. On April 18, 2018, the parties, through counsel, presented oral arguments on Respondent's Motion for Summary Judgment before ALJ Malherbe. At the close of the hearing, ALJ Malherbe stated as follows:

> [T]he issue is Child Find statute and what constitutes notice. . . . I don't think that the school district had notice. . . . So I'm going to grant the Motion for Summary Judgment. . . . Mr. Campbell, will you draft [a proposed order] for my signature, trying to find Mr. Howard for any comments that he might wish to make.
>
> Transcript, pgs. 78:24-25 and 79:1 – 15.

55. On April 30, 2018, ALJ Malherbe entered in Order as follows: "This matter came on for consideration of various Motions on April 18, 2018. After hearing oral arguments, the Undersigned gave her rulings on the record. Counsel for the Parties agreed to confer with each other and submit an Order to the Undersigned. The Undersigned hereby directs the Parties to submit a Proposed Order on or before **May 4, 2018**." (Emphasis in original.)

56. On April 30, 3018, Respondent, copying Petitioners' counsel, submitted to ALJ Malherbe a proposed Order granting its Motion for Summary Judgment and dismissing Petitioners' Petition for a Contested Case Hearing, along with a cover letter in which Respondent's counsel explained the parties' consultation regarding the drafting of that proposed order.

57. On May 1, 2018, ALJ Malherbe entered a Final Decision Granting Summary Judgment in favor of Respondent and dismissing Petitioners' Petition for a Contested Case with prejudice.

58. None of the motions pending before ALJ Malherbe, other than Respondent's Motion for Summary Judgment, were resolved in this May 1, 2018, Final Decision Granting Summary Judgment.

59. On May 18, 2018, Respondent completed its evaluation of M.L. and found him ineligible for special education and related services.

60. On May 31, 2018, Petitioners filed a Notice of Appeal giving notice that Petitioners "hereby Appeal from the Final Decision Granting Summary Judgment entered herein on May 1, 2018, by the Honorable Judge Selina Malherbe in the above-captioned action."

61. On May 31, 2018, Petitioners also filed a Memorandum of Law in Support of Notice of Appeal of Final Decision Granting Summary Judgment.

62. On June 7, 2018, the undersigned received a FedEx package from the Public Schools of North Carolina containing certain records in this appeal, and subsequently the undersigned

received additional record materials via email from both DPI and the parties. All such records are identified above on pages 1 – 2.

BACKGROUND FACTS REGARDING MOOTNESS ISSUE:

63. On June 18, 2018, Respondent submitted to the undersigned a Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer based on mootness of Petitioners' claims.

64. Respondent's June 18, 2018, motion asserted specifically that "this matter is moot and neither the Office of Administrative Hearings nor the North Carolina Department of Public Instruction, by and through the state Review Officer, have subject matter jurisdiction as a matter of law."

65. Respondent had also presented a mootness argument to the ALJ on April 16, 2018, in Respondent's Supplemental Authority re: Motion for Summary Judgment prior to the ALJ's issuance of the Final Decision Granting Summary Judgment on appeal in this case.

66. Respondent argued in its April 16, 2018 pleading: "At this time, there is no legal dispute between the parties regarding an evaluation of M.L. The Respondent did not deny the Petitioner's request to evaluate M.L. Therefore, this lawsuit a) lacks a current controversy, b) is premature and c) is legally moot as to the remedy of a court-ordered evaluation or any other involvement by this Court in the on-going evaluation process." Respondent's Supplemental Authority re: Motion for Summary Judgment, p. 5.

67. In oral argument before ALJ Malherbe on April 18, 2018, neither Respondent nor ALJ Malherbe raised the issue of mootness advocated by Respondent in its April 16, 2018, filing. No variation of the term "moot" is contained in the index to the transcript of this hearing; searches of the transcript for usage of the term "moot" and its known variants yield no results; and a careful reading of the transcript reveals no discussion of mootness.

68. Neither Respondent's proposed decision resolving its Motion for Summary Judgment nor ALJ Malherbe's May 1, 2018, Final Decision Granting Summary Judgment address Respondent's claim of mootness; both address the merits of Respondent's Motion for Summary Judgment on Petitioners' Child Find claim without acknowledging Respondent's assertion that Petitioners' claim had been mooted by its agreement to evaluate M.L.

69. Respondent nonetheless presented *another* mootness argument in a Motion to Dismiss before the ALJ on June 15, 2018 — subsequent to Petitioners' Appeal in this case but prior to Respondent's submission of its June 18, 2018, Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer to the undersigned.

70. Respondent's June 15, 2018, Motion to Dismiss asserted "any alleged procedural violation of the Child Find requirement has become moot. Simply put, M.L. has been determined ineligible for special education and related services, and therefore, this action must be

dismissed because any Child Find error by Respondent did not actually interfere with M.L.'s right to a FAPE pursuant to IDEA."

71. The mootness argument in Respondent's June 15, 2018, motion is distinct from the mootness argument in its April 16, 2018, filing in only one notable respect: At the time of the June 15, 2018, filing, Respondent had not only agreed to evaluate M.L. (as was also the case in the prior mootness argument), but it had also completed that evaluation and determined, over Petitioners' objection, that M.L. was not eligible for special education despite his disabilities.

72. On June 18, 2018, Respondent reported to the undersigned that "BY ORDER dated June 18, 2018, Administrative Law Judge, Ms. Selina Malherbe ruled that all matters occurring after May 1, 2018, are under the jurisdiction of the State Review Officer," not the ALJ.

73. Although the undersigned does not have a copy of this asserted June 18, 2018, Order of the ALJ, Respondent's characterization of this order is uncontested before the undersigned.

74. Petitioners confirmed Respondent's representation regarding a June 18, 2018, Order of the ALJ by email of the same date to the undersigned (copying counsel for Respondent).

75. For purposes of resolving Respondent's Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer, the undersigned accepts the parties' representation as to the existence and nature of the June 18, 2018, Order.

76. Respondent's June 18, 2018, Formal Submission of Motion to Dismiss Appeal and Petition stated that "the evidence and arguments [Respondent offered before the ALJ] in support of this motion are … incorporated … by reference as if fully set forth" in the motion before the undersigned.

77. On June 28, 2018, Petitioners submitted Petitioners' Response to Respondent's Motion to Dismiss Petition and now argue that "the Contested Case Petition ("CCP") is not moot and, if the CCP is moot, the issues fall within the capable of repetition yet evading review exception to the mootness doctrine."

78. Petitioners argue that the Petition is not moot because (1) Respondent's post-February-2018 evaluation and eligibility determination does not moot the "issue [of] whether the Respondent should have identified, located, and evaluated M.L. during the period of February 2017 through February 2018," especially because the post-February-2018 evaluation did not consider ***all areas*** of suspected disability, and (2) Respondent's post-February-2018 evaluation and eligibility determination did not respond to all "thirteen separate items as [sic] relief in the [Petition]" and thus offered, at best, "partial relief."

79. Petitioners alternatively argue that "[i]f the Child Find matter is considered moot, the matter is too short in duration to be fully litigated since M.L. is young, disabled, and continues to have behavioral and academic challenges."

80. On July 2, 2018, Respondent submitted Respondent's Reply to Petitioner's Response to Respondent's Motion to Dismiss, making an argument that Petitioners' action does not fall within the capable-of-repetition-yet-evading-review exception to the mootness doctrine.

81. Both Respondent and Petitioners agree that *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890, *cert. denied*, *Peoples v. Judicial Standards Comm'n*, 442 U.S. 929 (1979), provides the applicable standard upon which to evaluate whether a claim is moot.

82. *In re Peoples*, 296 N.C. at 147, provides: "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law."

83. In this case, the relief sought has not been granted in full (and it is not clear on the record before the undersigned whether it has been granted in part), and the questions originally in controversy between the parties remain at issue.

84. Respondent asserts that Petitioners' Appeal, and their underlying Petition, are moot because they seek relief through Child Find, and Respondent has now evaluated M.L. and determined, over Petitioners' objection, that he is not eligible for special education.

85. M.L and his mother point out that their Petition seeks relief *beyond* an evaluation and IDEA eligibility by the Respondent. Petitioners "requested thirteen separate items as relief" and Respondent does not demonstrate how each of those requests has been satisfied or otherwise addressed to render the Petition and this Appeal moot. *See* Petitioners' Response in Opposition to Respondent's Motion for Summary Judgment.

86. The undersigned reviewed the Petition as well as the post-Petition materials provided by the parties. It does *not* appear on the record evidence before the undersigned, that *all* requested relief specified by Petitioners on pages 20-22 of their Petition for a Contested Case Hearing (Special Education) has been provided through Respondent's evaluations and non-eligibility determination.

87. The Petition offers many paragraphs specifying requested relief, including, for example, a request for an independent educational evaluation. *See* 34 C.F.R. § 300.502(a) (recognizing that a parent of a child with a disability has a right to an independent educational evaluation, subject to the limitations of the Act). There is no evidence in the record to indicate that Respondent provided an independent educational evaluation to Petitioners; Respondent's *own* determination on its *own* evaluations that M.L. is not eligible for special education as asserted to support its mootness argument does not satisfy a request for an *independent* educational evaluation, which is, by definition, "conducted by a qualified examiner *who is not employed by the public agency responsible for the education of the child in question*." 34 C.F.R. § 300.502(a)(3)(i). Respondent does not make any argument regarding this requested relief.

88. The record before the undersigned is not sufficiently developed to enable the undersigned to evaluate whether *particular*, limited portions of the relief requested by Petitioners on pages 20 to 22 of their February 1, 2018, Petition for a Contested Case Hearing (Special Education) have been satisfactorily provided by Respondent through its determination that M.L. is not eligible for special education and related services.[2]

89. Respondent does not directly address or analyze the relief-sought-has-been-granted prong of the mootness doctrine in support of its motion.

90. Respondent seems to rely on the alternate prong from *In re Peoples* – that "the questions originally in controversy between the parties are no longer at issue" – to demonstrate mootness.

91. The question raised in Petitioners' Petition for a Contested Case Hearing (Special Education) – whether Respondent violated its Child Find obligations under the IDEA as alleged in the Petition – is *not* resolved by the facts and arguments offered in Respondent's Motion to Dismiss on mootness grounds.

92. Respondent argues that its own determination that M.L., a child with a recognized disability, is not eligible for special education, resolves that question. But that is only correct *if Petitioners do **not** contest Respondent's eligibility determination*, as they do in their arguments before the undersigned, and as they may in a new Petition for a Contested Case Hearing in accordance with their rights under the IDEA.[3]

93. Respondent's substantive mootness argument, that its determination that M.L. is not eligible for special education under the IDEA resolves the Child Find questions originally in controversy, fails until the time for Petitioners' to challenge Respondent's eligibility determination expires (or until any timely challenge made is fully resolved).

94. Respondent's substantive mootness argument requires resolution of a question — whether Respondent's post-Petition determination (following its post-February-2018 evaluation) that M.L. is not eligible for special education and related services *is proper* — that is not

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[2]The burden of proof on this point is upon the Respondent as it is Respondent's motion. But Respondent did not offer any meaningful analysis on this issue. Rather than carefully demonstrating that all Petitioners' requested relief has been provided or is otherwise not appropriate, Respondent relies upon its argument that because it evaluated M.L. subsequent to the Petitioners' filing of their contested case and determined that, despite his disabilities, he is ineligible for special education and related services, M.L.'s Child Find claims must be dismissed as not in controversy. *See* Respondent's Motion to Dismiss Petition (incorporated into the Formal Submission of Motion to Dismiss Petition and Appeal).

[3] Petitioners do not assert that they have filed a new Petition for a Contested Case Hearing to challenge Respondent's eligibility determination, but the statute of limitations on that "new action" has not run. And Petitioners argue before the undersigned that Respondent's determination was improper and should be reviewed. Petitioners argue that Respondent's in-eligibility determination is improper in violation of the IDEA because (1) Respondent did not take into account *all areas* of suspected disability and (2) M.L.'s disabilities adversely affect his educational performance, both behaviorally and academically, contrary to Respondent's determination.

sufficiently developed in the record or appropriate for review before the undersigned in this appeal.

95. *If* Respondent's post-Petition determination (following its post-February-2018 evaluation) that M.L. is not eligible for special education *is* proper, *then* it would render harmless Petitioners' asserted violations of Child Find from February 2017 through February 2018 as argued by Respondent.

96. In this hypothetical case, Respondent would be correct that the IDEA does not penalize a school district for failing to evaluate a child who does not need special education, as there would be no interference with FAPE for a child who is not entitled to special education under the Act. *See D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887, 893 (5th Cir. 2012) (unpublished) (stating, after affirming the district court's determination on the record evidence that the child did *not* need special education during the relevant time, that "IDEA does not penalize school districts for not timely evaluating students who do *not need* special education").

97. On the other hand, if Respondent's post-Petition determination (following its post-Petition evaluation) that M.L. is not eligible for special education is *im*proper and in violation of the IDEA, as Petitioners argue, then it would *not* render harmless the asserted Child Find violations.

98. In this alternative hypothetical case, Respondent would be in violation of its IDEA obligations, despite its post-Petition evaluation and determination of ineligibility, and *would* be interfering with the child's right to a FAPE in the LRE under the IDEA by refusing to recognize the child as one with a disability eligible for special education and related services under the IDEA. *See, e.g., D.K. v. Abington Sch. Dist.*, 696 F.3d 233, (3rd Cir. 2012) (recognizing that "a poorly designed and ineffective round of testing does not satisfy a school's Child Find obligations"); *G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 465-67 (E.D. Pa. 2011) (finding that a school's re-evaluation of an elementary-school child with significant behavioral problems was inadequate because it emphasized the child's academic proficiency and assessed behavioral issues only cursorily); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016).

99. In this case, unlike in *D.G. v. Flour Bluff Independent School District*, the case relied upon by Respondent, the record does not enable the undersigned to review the question of whether Respondent's determination that M.L. does not need special education is proper.

100. Respondent acknowledges that the question of whether its post-February-2018 determination that M.L. is not eligible for special education is *not* before the undersigned.

101. Respondent explains, "Petitioner can pursue a *new* due process action challenging the Respondent's May 18, 2018, decision finding M.L. ineligible for services under the IDEA; however, such a claim, if any, is a *new action*." (Emphasis added).

102. Despite recognizing that any challenge to Respondent's eligibility determination must await resolution in a "new action," Respondent nonetheless implies that for purposes of Respondent's Motion to Dismiss the *current* Petition, the undersigned must assume the not-yet-resolved eligibility determination was proper. The Respondent did not present any authority to support this assumption.[4]

103. The undersigned does not make such an assumption.

104. The record before the undersigned does not allow the undersigned to resolve, one way or the other, the propriety under the IDEA of Respondent's determination that M.L. is not eligible for special education and related services.

105. As such, "the questions originally in controversy between the parties," *see In re Peoples*, 296 N.C. at 147, particularly the question of whether Respondent violated Child Find to the detriment of M.L.'s right to FAPE in the LRE under the IDEA by failing to "identif[y] locate[], and evaluate[] M.L. during the period of February 2017 through February 2018," *see* Petitioners' Response in Opposition to Respondent's Motion to Dismiss Petition, p. 7, are *not* resolved by the still-contested, post-Petition evaluation and eligibility determination.

106. Respondent's contested post-Petition determination that a child with a disability is not eligible for special education does not render moot the Petitioners' original Petition at the foundation of the Petitioners' appeal of the ALJ's Final Decision Granting Summary Judgment.

107. An independent review of the record reflects that all relief sought by the Petition has not been satisfactorily provided, and thus the first prong of the mootness doctrine is not satisfied. *See In re Peoples*, 296 N.C. 109, 250 S.E.2d 890, *cert. denied*, *Peoples v. Judicial Standards Comm'n*, 442 U.S. 929 (1979). The record before the undersigned is not sufficiently developed to enable the undersigned to evaluate whether portions of the relief requested by Petitioners have been satisfactorily provided by Respondent through its post-Petition actions.

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[4] Although Respondent made no argument that N.C. Gen. Stat. § 115C-44(b) has any relevance to the mootness argument at the heart of its Formal Submission of Motion to Dismiss Petition and Appeal to State Review Officer, the undersigned is aware of that statute. The undersigned recognizes that N.C. Gen. Stat. § 115C-44(b) provides that "[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct." In this case, however, the Respondent properly made no argument regarding this statutory provision in the context of its mootness claim because the underlying action of the local board, the new non-eligibility determination, is not the subject of the Petitioners' *current* action on appeal. As Respondent acknowledges, any challenge to that non-eligibility determination must be made in a "new action." Thus, the presumption of correctness with respect to the not-yet-challenged non-eligibility determination, is not entitled to the presumption triggered by "action[] brought against a local board of education." Here the Board's non-eligibility determination is raised *not* in Petitioners' action, but instead *by Respondent* in *Respondent's* post-Petition and post-Appeal Motion to Dismiss. As such, the statutory presumption does not decide the matter for the undersigned.

108. An independent and comprehensive review of the record reflects that the questions raised by the Petition are not resolved by the still-contestable (and still contested) facts asserted in Respondent's Motion to Dismiss as moot; thus, the Petition and this Appeal are not moot under the second prong of the mootness doctrine. *Id.*

BACKGROUND FACTS REGARDING THE MERITS OF THE ALJ'S GRANT OF SUMMARY JUDGMENT:

109. Because the undersigned finds (see above) that neither the Petition itself nor the Appeal of the ALJ's Final Decision Granting Summary Judgment is rendered moot by the Respondent's post-Petition and post-Appeal determination that M.L. is not eligible for special education and related services, the undersigned addresses the merits of Petitioners' Notice of Appeal of Final Decision Granting Summary Judgment.

110. The ALJ's Final Decision Granting Summary Judgment is brief. It made no findings of fact and only two conclusions of law.

111. The ALJ's written conclusions included the following:

a. "The Respondent . . . met its burden of demonstrating that there is no genuine issue of material fact regarding Petitioners' claims for relief pursuant to the "Child Find" requirements of the Individuals with Disabilities Education Act. 20 U.S.C. § 1415(k)(5)(b)[;]" and
b. "In response to the Respondent's Motion and submissions, the Petitioners have failed to produce a forecast of evidence through specific facts to demonstrate that the Petitioners can at least establish a prima facie case at trial. The mere allegations contained in the Petition are not sufficient to survive Summary Judgment."

112. Petitioners assert that the ALJ erred in granting summary judgment in favor of Respondent because (1) "the ALJ erroneously determined that there were no genuine issues of material fact" and (2) the ALJ "incorrectly determined that Appellant[]s [Petitioners] failed to provide a forecast of evidence demonstrating that Appellee[Respondent] failed to identify, locate, and evaluate M.L. prior to February 2, 2018," as required by Child Find. *See* Petitioners' Memorandum of Law in Support of Notice of Appeal of Final Decision Granting Summary Judgment, p. 1.

113. Respondent asserts that there is no dispute of fact and that "Respondent produced competent evidence through affidavits that its Child Find obligation was not triggered prior to the filing of the Petition as a matter of law." *See* Respondent/Appellee's Written Argument on Appeal, p. 6.

114. Summary judgment is appropriate when (1) no genuine dispute of material facts exists, and (2) the moving party is entitled to judgment as a matter of law.

115. After an independent review of the record, the undersigned agrees with the ALJ that the material facts in this case are undisputed.

116. The material facts before the undersigned for review are contained within the filings identified above and in affidavits from Ms. Mungo and 6 school employees – including M.L.'s kindergarten and first-grade teachers – a number of which attach as exhibits various of M.L.'s educational, medical, and behavioral records.

117. The parties do not dispute the accuracy of the medical, educational, and behavioral records attached to the affidavits and other filings.

118. With respect to M.L.'s behavior, the parties agree that M.L. has engaged in persistent problematic behavior at school. *See* Paragraphs 5 – 10 above.

119. The parties disagree only with whether those persistent problematic behaviors are indicative of a disability that requires special education such that Respondent violated Child Find when it failed to "identify, locate, and evaluate" M.L. after observing those behaviors. *See* Paragraphs 11 – 12 & 25 – 31 above.

120. The parties agree that M.L. did not stay in his seat when he was expected to do so; he yelled at inappropriate times and in inappropriate manners; he punched, slapped, grabbed, kicked, elbowed, threw rocks at, spit upon, bullied, and made fun of other students and/or school employees, sometimes causing injuries; he used inappropriate language, including shouting "What the F**k!" and "I'm going to suck your d**k!" on different occasions; he held up his middle finger; he "stole" papers and grabbed pencils; he ran in the school building and on the bus when running was in appropriate. *See* Mungo Affidavit 1 ¶¶ 24 & 33, Exhs. 4 – 7.

121. M.L.'s mother, Ms. Mungo, argues that these agreed-upon behavioral challenges combined with M.L.'s academic challenges triggered Child Find at some point before she filed her Petition for a Contested Case Hearing half-way through M.L.'s first-grade year because they should have indicated to Respondent that M.L. was a child with a disability who needed special education and related services. *See* Paragraph 12 above.

122. In contrast, M.L.'s teachers, counselors, and school psychologists, while recognizing M.L.'s agreed-upon behaviors as problematic, argue that at no time did M.L.'s behaviors indicate to them that M.L. had a cognitive impairment or was in any way in need of special education – especially because they thought he was responding to whole-school behavioral strategies and interventions. *See* Paragraph 11 above.

123. Similarly, the parties agree about M.L.'s test results and what is reported on M.L.'s report cards (reflecting, on the materials contained in the record, that M.L. is not yet performing at grade level with consistency). *See* Paragraphs 18 & 20 above.

124. With respect to M.L.'s academic challenges, the parties only disagree about whether the recorded below-grade-level performance should have triggered Child Find when viewed in combination with M.L.'s challenging school behaviors. *See* Paragraphs 14 – 15 & 16 – 23 above.

125. M.L.'s mother, Ms. Mungo, argues that M.L. can do better in school and that the reason that he is not performing at grade level is in part a result of the disruption to his learning and focus following his frequent removals from his classroom to another classroom, a behavioral support technician, the principal, the hallway, or home due to his problematic behaviors. Ms. Mungo does not believe below-grade-level performance is sufficient, and she argues that Respondent should have suspected M.L. was a child with a disability based on that performance in combination with his problematic behavior at school. *See* Mungo Affidavit 1, ¶¶ 35 & 38 – 40.

126. M.L.'s teachers, on the other hand, argue that M.L.'s performance is appropriate and acceptable for him at this time and that he is doing fine in the classroom. Their position is that M.L. arrived in kindergarten with below-average readiness for school, and he remains below average in first grade. But he is making progress, they argue, along his trajectory (even reaching "average" or "slightly above average" in math in first grade, according to his teacher, Ms. Jean). In other words, he is learning and making progress, but he is not yet making the accelerated progress necessary to push him entirely out of the trajectory he was on when he arrived at school. Thus, despite his typically below-grade-level marks, they believe he "doing well" and not in need of special education.[5] *See e.g.*, Gibson Affidavit ¶¶ 6 – 7, Jean Affidavit ¶¶ 7 – 9, Mungo Affidavit 1 ¶ 11 & Exh. 9.

127. M.L.'s first-grade teacher states that "M.L. does not need accommodations in the classroom to get his work done and make academic progress." Jean Affidavit ¶ 16.

128. The ALJ's decision contains no findings of fact on these matters, and her conclusions of law do not identify the basis for her determination that Respondent is entitled to judgment as a matter of law on these facts.

129. At the close of the hearing, on the record, however, ALJ Malherbe stated as follows: [T]he issue is Child Find statute and what constitutes notice. … I don't think that the school district had notice. …So I'm going to grant the Motion for Summary Judgment." Transcript, pgs. 78:24-25 and 79:1 – 15.

130. The IDEA has two, somewhat in tension, goals in the Child Find context.

131. On one hand, to facilitate the IDEA's primary purpose "to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A) (emphasis added), the IDEA requires that states must "ensure" that "[*a]ll* children with disabilities residing in the State . . . regardless of the severity of their

[5] As Respondent continues to work with M.L., it is worth noting that the IDEA reminds that "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by — (A) having high expectations for such children." 20 U.S.C. § 1400(c)(5)(A). That M.L.'s teachers appear satisfied with M.L.'s current performance gives the undersigned some pause, but Review Officers are not to second guess the educational judgments of the educators. *See Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

disabilities . . . who are in need of special education and related services, are ***identified, located, and evaluated,***" 20 U.S.C. § 1412(a)(3)(A) (emphasis added). This obligation is commonly known as Child Find.

132. In short, the state, via its school systems, has an affirmative obligation to "find" or "identify, locate, and evaluate" all children with disabilities in their jurisdictions who need special education and related services to ensure that all eligible children have access to those services to prepare for "further education, employment, and independent living."

133. "That this [Child Find] evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom." ***Timothy O. v. Paso Robles Unified Sch. Dist.***, 822 F.3d 1105 (9th Cir. 2016).

134. On the other hand, as states work to identify, locate, and evaluate children with disabilities who need special education and related services, they must also exercise caution to avoid mislabeling children as needing special education when they do not. The IDEA incorporates findings that "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by … providing … whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children." 20 U.S.C. § 1400(c)(5)(F).

135. In other words, the IDEA encourages schools to employ whole-school efforts "to *reduce* the need to label children," "address[ing] the learning and behavioral needs of such children" through interventions that minimize the need to "identify" them as otherwise required through Child Find.

136. And "[a]s several courts have recognized … Child Find does not demand that schools conduct a formal evaluation of every struggling student" immediately. ***D.K. v. Abington Sch. Dist.***, 969 F.3d 233, 249 (3rd Cir. 2012). It is "inappropriate to rush to judgement" and the "School District [is] not required to jump to the conclusion that … misbehavior be denoted a disability or disorder because hyperactivity, difficulty following instructions are not atypical during early primary school years." ***Id.*** at 251. This is especially true when the school district is employing a whole-school strategies in the early years, does "not neglect [the child's] difficulties," "took proactive steps[,] … and worked closely with his parents to maximize his potential for improvement" in kindergarten and first grade.[6] ***Id.*** at 252.

[6] The undersigned recognizes that *D.K.* does not provide a perfect analogy to the facts of this case. Although the child in D.K. was diagnosed with ADHD, like M.L., and although the child in D.K. was not evaluated for the first time until his first-grade year, like M.L., and although the school system in D.K. was working with the child's parents to address his behavioral difficulties in kindergarten and first grade, like Respondent was here, the child in D.K. performed considerably better in response to the school system's interventions than did M.L. did to Respondent's interventions. D.K. achieved proficient and advanced marks; M.L.'s report cards reflect that he did not. M.L. remained consistently below grade level.

137. The use of whole-school strategies, of course, "cannot be used to delay or deny the provision of a full and individual evaluation . . . to a child suspected of having a disability." OSEP Memorandum, Jan. 21, 2011 (re: A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Act (IDEA)). The IDEA is clear that the Child Find obligation is broad, extending not only to children present themselves as having a disability, but also to children "who are ***suspected*** of being a child with a disability . . . and in need of special education." 34 C.F.R. § 300.111(c)(1).

138. This case falls squarely within the tension between the state's Child Find obligation to "identify, locate, and evaluate" children suspected of having a disability and the IDEA's reminder that school system should employ whole-school approaches, including positive behavioral interventions and supports, to ***reduce*** the need to label a child as in need of special education when the child, in fact, requires only positive behavioral interventions and supports.

139. The question becomes, then, under the record evidence in this case, whether Respondent crossed the line ***from permissible use*** of whole-school strategies to avoid an "inappropriate rush to judgment" to label M.L. as in need of special education based on behavior that is "not atypical during early primary school years" ***to improper delay*** of Child Find's mandate to "identify, locate, and evaluate" a child with suspected disabilities who may be in need of special education.

140. The record evidence demonstrates that Respondent did not cross this line; Respondent engaged in permissible use of whole-school strategies, particularly behavioral interventions and supports, to address M.L.'s recognized challenges without violating Child Find between February 2017 and February 2018, while M.L. was in kindergarten and beginning first grade.

141. On the record before the undersigned, Respondent did not know M.L. was a child with a disability (ADHD) during the period in dispute (February 1, 2017 through February 1, 2018). Petitioners did not tell Respondent of M.L.'s June 2017 diagnosis, and Petitioners did not request an evaluation or otherwise express concern that M.L. needed special education until ***after*** the Petition was filed.[7]

142. This case challenges Respondent's failure to "identify, locate, and evaluate" a child Petitioners allege should have been ***suspected*** of having a disability and needing special education.

143. The parties appear to disagree about the test that applies to Child Find cases involving children who are alleged to have been ***suspected*** (based on in-school behavior and performance), but not known, to have had a disability.

[7] And once Petitioners requested an evaluation in February 2018, Respondent agreed to and did perform one.

144. The IDEA does not offer a definition of "suspected" for purposes of Child Find's obligation to locate, identify, and evaluate all children "suspected" of having a disability who need special education. In other words, the IDEA itself offers no specific test to apply when evaluating whether a child is "suspected" of having a disability for purposes of Child Find.

145. Neither party presents clear precedent from the Fourth Circuit establishing the standard that applies in this jurisdiction to determine when a child is "suspected" of having a disability for purposes of triggering Child Find obligations.

146. And the ALJ's final decision offers no explanation or clear authority for its determination that Respondent is entitled to judgment as a matter of law.[8]

147. Because Petitioners' appeal fails under ***both*** Petitioners' and Respondent's proposed tests, the undersigned need not resolve the dispute between them about which is proper. All are addressed here.

148. Respondent largely argues that the test of when a child is "suspected" of having a disability for purposes of Child Find should be imported from the IDEA's provisions governing school discipline of a child who is not yet eligible for special education and related services. *See* 20 U.S.C. § 1415(k)(5).[9]

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[8] The ALJ's decision does include a citation to 20 U.S.C. § 1415(k)(5)(b) following this conclusion of law: "The Respondent . . . met its burden of demonstrating that there is no genuine issue of material fact regarding Petitioners' claims for relief pursuant to the "Child Find" requirements of the Individuals with Disabilities Education Act." This citation is *not* a reference to the IDEA's Child Find requirements. Instead, it is a reference to the IDEA's provisions regarding the availability of protections for children not yet eligible for special education who are subject to school discipline under the Act. Respondent argued that this school-discipline definition of "basis of knowledge" of a disability should also apply to limit the term "suspected" of a disability in the context of Child Find. With nothing further to explain this citation in the ALJ's decision, the undersigned cannot determine whether it is there because it was in the draft order proposed by Respondent or whether the ALJ, in fact, concluded that the "basis of knowledge" test in the school-discipline context also defines "suspected" for purposes limiting of Child Find's obligation to locate, identify, and evaluate all children suspected of having disabilities.

[9] Respondent cites only two lower court decisions as referencing the definition of "knowledge" of a disability from the IDEA's discipline provisions in the context of understanding "suspected" of having a disability for purposes of Child Find. *See* Respondent's/Appellee's Written Arguments on Appeal, p. 7-8. Neither of the cases cited treats the definition of "knowledge" as *fully* encompassing the meaning of "suspected," but recognizes that if one has "knowledge" of a disability then one certainly "suspects" a disability. In other words, "knowledge" is a subset of "suspicion" in this context, but other evidence in addition to "knowledge" can also give rise to "suspicion." The first case, *T.B. v. Prince George's County Bd. of Educ.*, 2016 WL 7235111 (D. Md. 2016), explained that Child Find "extends to 'children who are suspected of being a child with a disability.'" *Id.* at 8. It then then stated: "Hence, the child find obligation is triggered where the state has *reason to suspect* that the child *may have a disability* and that special education services *may be necessary* to address that disability." *Id.* (emphasis added, and internal quotations omitted). The court did *not* state that *knowledge* is required – only "reason to suspect that the child *may* have a disability." Only after making clear this *broad* understanding of Child Find, the court recognized that a school system is "deemed to have knowledge that the child may suffer from a disability" under the circumstances identified in 20 U.S.C. 1514(k)(5). But the court did *not* limit when a child may be *suspected* of having a disability to situations in which a school system is *deemed to know* of that disability. In *T.B.*, the child's parents had specifically requested evaluations and expressed concerns in writing multiple times. Thus, two of the three prongs of the "deemed to know" standard were plainly satisfied. There was no reason for the court to consider a situation where knowledge was not imputed, but a suspicion might

149. The IDEA's school discipline provisions provide, in relevant part, that a child who "has engaged in behavior that violates a code of student conduct" and has not yet been determined eligible for special education and related services *may* enjoy the benefit of the IDEA's procedural protections regarding changes of placement in excess of 10 days only if the school system "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." *Id.*

150. In this disciplinary context, the IDEA defines when a school system had "knowledge" that a child is one with a disability. A school system is deemed to have had such "knowledge" for purposes of the specified disciplinary provisions in three situations: (1) "the parent of the child has expressed concern in writing to supervisory or administrative personnel . . . or a teacher of the child, that the child is in need of special education and related services;" (2) "the parent of the child has requested an evaluation of the child;" or (3) "the teacher of the child, or other personnel of the local education agency, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of such agency or to other supervisory personnel of the agency." 20 U.S.C. § 1415(k)(5)(B).

151. If this definition of "knowledge" that a child *is* a child with a disability from the IDEA's provisions on school discipline applies, as Respondent argues it does, to constrain when a child is "suspected" of having a disability for purposes of Child Find, then Petitioners' claim that M.L. was a child "suspected" of having a disability between February 2017 and February 2018 fails.

152. Walking through each of the three prongs of the "basis of knowledge" test in 20 U.S.C. § 1415(k)(5)(B) makes clear the evidentiary shortfall under the facts presented here.

153. First, the record before the undersigned contains no evidence that M.L.'s parent expressed concern in writing from February 2017 through the date of the Petition, February 1, 2018, that M.L. was in need of special education and related services. The Petition is the first written expression of such concern, and it was followed by a February 22, 2018,

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nonetheless exist. In the second case cited by Respondent, *School Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 928 (E.D. Va. 2010), the court made clear that situations outside the three "deemed to know" categories in 20 U.S.C. 1514(k)(5) may trigger Child Find based evidence that provided a reason to suspect a disability. This district court also referenced 20 U.S.C. 1514(k)(5), but it made clear that the "knowledge" test of 20 U.S.C. 1514(k)(5) does not limit the meaning "suspected" under Child Find. The court stated: "the 'child find' obligation is triggered where the state has *reason to suspect* that a child *may* have a disability and that special education services *may be necessary* to address that disability." *Id.* at 942. The court elaborated on what this requires as follows: "In order to establish a procedural violation of the 'child find' requirement, the claimant 'must show that school officials *overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification* for not deciding to evaluate." *Id.* at 942-43 (emphasis added). Notably, the court did *not* require that a claimant show "knowledge" as defined in 20 U.S.C. 1514(k)(5). Ultimately, the court determined under the facts presented that even without "knowledge" as defined in 20 U.S.C. 1514(k)(5), the claimant established a Child Find violation through evidence that the school system "overlooked clear signs of disability" when it ignored "several behavioral incidents . . . [that] placed the School Board on notice" of the need for further evaluation under Child Find. *Id.* Respondent seems to acknowledge this broader standard on page 10 of Respondent's/Appellee's Written Arguments on appeal.

request for an evaluation, which was granted by Respondent. *See* 20 U.S.C. § 1415(k)(5)(B)(i).

154. Second, the record before the undersigned contains no evidence that M.L.'s parent requested an evaluation of M.L. at any time prior to the filing of the Petition on February 1, 2018. *See* 20 U.S.C. § 1415(k)(5)(B)(ii). And it contains some evidence affirmatively indicating that she did not.

155. Third, each of the six teachers and school administrators who submitted an affidavit for consideration on the motion for summary judgment in this matter swore that "[a]t no time . . . did I express to the CMS Director of Special Education or other supervisory personnel a concern regarding a specific pattern of behavior demonstrated by M.L." *See* 20 U.S.C. § 1415(k)(5)(B)(iii).

156. Thus, if the definition of "knowledge" in 20 U.S.C. § 1415(k)(5)(B) also defines "suspected" in 34 C.F.R. § 300.111(c)(1), Petitioners' Child Find fails because the record evidence does not satisfy that definition.

157. Petitioners, however, argue that "knowledge" that a child is one with a disability for purposes of 20 U.S.C. § 1415(k)(5)(B) does *not* constrain the meaning of "suspected" of having a disability for purposes of Child Find.

158. Instead, Petitioners assert two alternate standards. First, Petitioners argue that "[i]n order to establish a procedural violation of Child Find, the claimant must [simply] show that the school overlooked signs of a disability," not that the school *knew* the child was a child with a disability. *See* Petitioners' Memorandum in opposition to Summary Judgment. Second, Petitioners argue that "a disability is 'suspected' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability." *See* Petitioners' Memorandum of Law in Support of Notice of Appeal of Final Decision Granting Summary Judgment, p. 31.

159. The first test proposed by Petitioners was established by the Sixth Circuit Court of Appeals. In *Board of Educ. Of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007), the Sixth Circuit considered as "a matter of first impression" what test to apply to a Child Find claim. The Court stated, "[w]e now adopt the standard . . . which provides that the claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for deciding not to evaluate." *Id.* at 313 (internal quotations and citations omitted).

160. The second test proposed by Petitioners was established by the Ninth Circuit Court of Appeals. In *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016), the Ninth Circuit affirmed that its "precedent establishes that a disability is 'suspected,' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. …[F]or example, we held that the 'informed suspicions of parents, who may have consulted outside experts,' trigger the

requirement to assess, even if the school district disagrees with the parent's suspicions." *Id.* (internal quotations and citations omitted).

161. In other words, under the Ninth Circuit test, "if a school district is on notice that a child *may* have a particular disorder, it *must* assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment." *Id.* (emphasis added to the word "may;" emphasis in original on the word "must").

162. In reviewing the record evidence as measured against these standards, the undersigned is constrained by the judgments of those who considered the matter initially. Review Officers may *not* "substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

163. And Review Officers must afford "due weight" to the administrative proceedings before the administrative law judge. *Rowley*, 458 U.S. at 207; *see also Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991) (evaluating a decision flowing from Virginia's two-tiered administrative process). The Fourth Circuit Court of Appeals interprets this "due weight" requirement to mean that "findings of fact by the hearing officers in cases such as these are entitled to be considered *prima facie* correct." *Doyle*, 953 F.2d at 105; *see also J.P. v. County School Board of Hanover County*, 516 F.3d 254, 259 (4th Cir. 2008) ("In this circuit, we interpret *Rowley*'s 'due weight' requirement to mean that the findings of fact made in the state administrative proceedings must be considered *prima facie* correct.'" (citing *Doyle*, 953 F.2d at 105)).

164. These constraints on the review by undersigned, combined with the limited record evidence in this case, require affirmation of the decisions of the school authorities and the ALJ. M.L. was not a child *suspected* of having a disability and in need of special education during the disputed period (February 2017 through February 2018) for purposes of Child Find.

165. In considering the Sixth Circuit test under the evidence in this case, the question becomes whether the "school officials overlooked clear signs of disability and were negligent in failing to order testing" or had "no rational justification for deciding not to evaluate" M.L. The school officials did not overlook clear signs of disability; they were not negligent in failing to order testing; and they had rational reasons for the actions they took.

166. In this case, six educational professionals, including two teachers with a combined twenty-one years of teaching experience, a school counselor who earned her Master's degree in School Counseling with a GPA of 4.0, and a school administrator with eleven years of experience, all swore that M.L.'s in-school behavioral and academic performance did *not* show signs (clear or otherwise) of cognitive impairment. There is no expert testimony in any form in the record to counter the consistent, educated, and experienced opinions reflected in the six professional educators' sworn statements.

167. And these educators did not miss or ignore M.L.'s challenges. Instead, they observed them, acknowledged them, and engaged with M.L. and his mother in whole-school strategies, including positive behavioral interventions and supports, to address them. Recognizing and acknowledging M.L.'s challenges, M.L.'s teachers and counselors never thought, according to their affidavits, that M.L. had a cognitive impairment. Instead, they worked with him just as they work with other children using the all-school strategies in place for all children.

168. That the IDEA *encourages* the kinds intervention, short of special education, employed by M.L.'s teachers "to reduce the need to label children," *see* 20 U.S.C. § 1400(c)(5)(F), indicates that it is a "rational," non-negligent response to these challenges – especially in a child's kindergarten and first-grade years as was the case here.

169. In considering the Ninth Circuit test under the facts of this case, the question becomes whether the school system had notice that M.L. "*may* have a particular disorder" (ADHD), based on an "informed suspicion," such that the school system was ***required*** to assess M.L., "regardless of the subjective views of its staff members concerning the likely outcome of such an assessment."

170. Ms. Mungo had not expressed an "informed suspicion" to the school system such that the school system had notice that M.L. may have ADHD until the Petition was filed, and M.L.'s school performance on its own did not provide that notice.

171. When M.L. began kindergarten, the school system had no basis upon which to suspect M.L. was a child with a disability. He arrived at the start of school just as all other children did, and no one suggested he had a disability. And at that time, even Ms. Mungo and M.L.'s pediatrician characterized him as a "spoiled child" rather than a child with a suspected disability. In fact, according to the record evidence on appeal, despite the frequent behavioral challenges and below-grade-level assessments in the first weeks and months of kindergarten, no one appears to have suspected anything other than "spoiled child" behavior until late April 2017 – as M.L.'s kindergarten year was coming to a close. Thus, at least through late April 2017, the record contains no evidence that anyone communicated to the school system an "informed suspicion" about M.L.'s possible disability. And M.L.'s teacher swore in her affidavit that his in-school performance did not suggest to her any cognitive impairment.

172. With this record evidence through the end of April 2017, the record contains insufficient basis upon which to supplant the judgment of six educational professionals – all of whom share considerable training and experience observing and supporting children at this age and stage of development – that M.L.'s school performance was not indicative of cognitive impairment or a need for special education. This is especially so when their judgment at that time was consistent with the judgment of both M.L.'s pediatrician and his mother.

173. In May 2017, however, Ms. Mungo asked M.L.'s teacher, Ms. Gibson, to complete a Vanderbilt rating scale, a form M.L.'s pediatrician provided for purposes of evaluating whether M.L. had ADHD. Ms. Gibson completed that Vanderbilt rating scale and discussed it with Ms. Mungo.

174. Petitioners argue that this gesture, requesting that Ms. Gibson complete the Vanderbilt rating scale, put the school system on notice of Ms. Mungo's "informed suspicion" that M.L. may have a particular disorder (ADHD) such that the school system was then ***required*** to evaluate M.L. even if its own employees believed the likely outcome of that assessment would be negative. *See Timothy O.,* 822 F.3d at 1105.

175. But Petitioners ignore another significant fact in connection with the Vanderbilt rating scale. Ms. Gibson, in her affidavit, swore that Ms. Mungo told her that "the doctor was ***not*** recommending medication based on the form." *See* Gibson Affidavit ¶ 15. Petitioners do not dispute this fact in the evidence presently in the record.

176. Because Ms. Mungo specifically stated when requesting that Ms. Gibson complete form that M.L.'s doctor was ***not*** using it for purposes of determining whether medicine was necessary to address M.L.'s behavior, Ms. Gibson could reasonably understand that Ms. Mungo sought input on the rating scale to inform the positive behavioral interventions and supports that they had been implementing together throughout the year, not due to any suspicion that additional, more significant intervention was necessary.

177. Two additional facts affirm the reasonableness of the school system's understanding. First, Ms. Mungo never followed up with the school system to communicate that M.L. had received a diagnosis of ADHD or any other potential impairment. With no follow-up after Ms. Mungo's initial statement that the forms would ***not*** be used to recommend medication for M.L., Ms. Gibson and others reasonably could infer that Ms. Mungo's statement that the forms would ***not*** create a basis for medicine, was correct. *See id.*

178. Second, after the request to complete the Vanderbilt rating scale in May 2017, the kindergarten year ended quickly. When M.L. began first grade, M.L. chose to transfer to a new school where he had a fresh start and appeared to be progressing according to his teacher.

179. M.L.'s new teacher, Ms. Jean, began working with M.L. quickly, and she saw measurable academic growth, Jean Affidavit ¶ 7. M.L. made an entire year's growth in reading in less than a school year, and although he began first grade below average in math, he progressed to "at or slightly above average for first grade) by the time this litigation commenced. *Id.*

180. Ms. Jean also employed new "restorative conversations" and "behavior trackers" in cooperation with the school's Behavior Management Technician and Ms. Mungo to support M.L.'s effort to make positive behavioral choices. Jean Affidavit ¶¶ 10 & 11. Through the time the Petition was filed, Ms. Jean observed that "these interventions

enabled M.L. to re-set his behavior and quickly return to the classroom" when necessary. Jean Affidavit ¶ 12.

181. Ms. Jean swore in her affidavit that M.L. "does not need accommodations in the classroom to get his work done and make progress," and "at no time have I believed that M.L. has any cognitive impairment." Jean Affidavit ¶ 16 & 8.

182. Although in collaboration with M.L.'s teacher through "behavior trackers," according to the record evidence, Ms. Mungo never communicated that she was concerned or had any suspicion that M.L. might be a child with a disability; instead, she participated in the whole-school strategies and positive behavioral interventions and supports already in place.

183. On the record evidence, given the deference owed to the educational professionals and to the ALJ's implied findings, the undersigned cannot find that the school system was on notice of M.L.'s ADHD or that Ms. Mungo communicated an "informed suspicion" that M.L. had ADHD prior to Ms. Mungo's filing of the Petition on February 1, 2018. The record evidence sufficiently supports the decisions of M.L.'s educators and the ALJ.

184. In the end, the undersigned's thorough and independent review of the record finds that the evidence, when the required deference is afforded to the educators involved, does not satisfy any of the proposed Child Find standards regarding instances in which a child is alleged to have been "suspected" of having a disability.

185. Nothing in this decision addresses whether Respondent's subsequent-to-the-Petition evaluation and eligibility determination comply with any provision of the IDEA.

186. Petitioners and Respondent may and should, as required by the IDEA, continue to work together, even after this appeal is resolved, to develop their shared understandings of M.L.s disabilities and the potential impact of those disabilities on M.L.s educational needs.

187. Petitioners may, even after issuance of this Decision, initiate a new Petition for a Contested Case Hearing to challenge Respondent's determination that M.L. is not eligible for special education and related services, despite his disabilities, and/or request an independent educational evaluation as provided in the IDEA and its implementing regulations. ***This Decision makes no findings or conclusions regarding the propriety of such a challenge or such a request***.

188. If the Petitioners do not yet have a copy of the Parents' Rights Handbook, formally titled Parents' Rights and Responsibilities in Special Education: Notice of Procedural Safeguards, the Petitioners may request a copy, and the Respondent must provide it, *see* 20 U.S.C. § 1415(d)(1)(A)(iii) ("A copy of the procedural safeguards available to the parents of a child with a disability . . . shall be given to the parents . . . upon request by a parent"), to assist Petitioners in understanding their rights under the IDEA.

189. Petitioners may also find a copy of the Parents' Rights Handbook online, https://ec.ncpublicschools.gov/parent-resources/ecparenthandbook.pdf, although the availability of this online resource does not eliminate the Respondent's obligation to provide a hard copy to the Petitioners should a parent request a copy.

Based on the foregoing Findings of Fact, the undersigned State Hearing Review Officer makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings and the State Hearing Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapter 115C, Article 9, of the North Carolina General Statutes; NC Policies 1500 *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq.; and IDEA's implementing regulations, 34 C.F.R. Part 300.

2. Respondent's just-occurring, and still contested and contestable, evaluation and determination that M.L. is not eligible for special education did not moot this appeal.

3. To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be considered without regard to their given labels.

4. Any issue not expressly identified in Petitioners' Notice of Appeal and advanced by the parties before the Undersigned is not properly before this Tribunal and cannot be resolved by this State Hearing Review Officer. *See E.L. ex rel. G.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 975 F. Supp. 2d 528, 535 n.8 (M.C.N.C. 2013) (stating that "under North Carolina law state review officers review only the issues specifically appealed"), *aff'd sub nom E.L. ex rel. Lorsson v. Chapel Hill-Carborro Bd. of Educ.*, 773 F.3d 509, 516 (4th Cir. 2014) (affirming that "the review officer had jurisdiction to review only those findings and decisions *appealed*") (emphasis in original).

5. IDEA was enacted to "ensure that *all* children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

6. Respondent is a local education agency receiving monies pursuant to 20 U.S.C. § 1400 et seq. and the agency responsible for providing educational services in Wake County, North Carolina. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300 et seq.; N.C. Gen. Stat. 115C-106 et seq.; *Policies Governing Services for Children with Disabilities* NC Policies 1500 et seq. These acts and regulations require the Respondent to satisfy the IDEA's procedural safeguards and provide FAPE for those children in need of special education residing within its jurisdiction.

7. This appeal involves a Final Decision Granting Summary Judgment.

8. Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c).

9. The record in this case discloses no genuine issue as to any material fact.

10. The record in this case discloses that Respondent is entitled to judgment as a matter of law.

11. Petitioners' claims allege Child Find violations based on Petitioners' position that M.L. was a child "suspected" of having a disability between February 2017 and February 2018 who was not evaluated for special education and related services during that time.

12. The IDEA imposes a Child Find obligation on States to facilitate the IDEA's primary purpose "to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

13. This Child Find obligation requires States to "ensure" that "[*a]ll* children with disabilities residing in the State . . . regardless of the severity of their disabilities . . . who are in need of special education and related services, are *identified, located, and evaluated*," 20 U.S.C. § 1412(a)(3)(A) (emphasis added).

14. "That this [Child Find] evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016).

15. On the other hand, as states work to identify, locate, and evaluate children with disabilities who need special education and related services, they must exercise caution to avoid mislabeling children as needing special education when they do not. The IDEA incorporates findings that "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by … providing … whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children." 20 U.S.C. § 1400(c)(5)(F).

16. In other words, the IDEA encourages school to employ whole-school efforts "to *reduce* the need to label children," "address[ing] the learning and behavioral needs of such children" through whole-school interventions that minimize the need to "identify" them as otherwise may be required through Child Find.

17. And "[a]s several courts have recognized … Child Find does not demand that schools conduct a formal evaluation of every struggling student" immediately, *D.K. v. Abington Sch. Dist.*, 969 F.3d 233, 249 (3rd Cir. 2012).

18. It is "inappropriate to rush to judgement," and the "School District [is] not required to jump to the conclusion that … misbehavior be denoted a disability or disorder because hyperactivity, difficulty following instructions are not atypical during early primary school years." *Id.* at 251.

19. This is especially true when the school district (1) is employing whole-school strategies in the early years, (2) does "not neglect [the child's] difficulties," (3) "took proactive steps[,] … and [4] worked closely with [the childs] parents to maximize [the childs] potential for improvement" in kindergarten and first grade. *Id.* at 252.

20. The use of whole-school strategies, of course, "cannot be used to delay or deny the provision of a full and individual evaluation . . . to a child suspected of having a disability." OSEP Memorandum, Jan. 21, 2011 (re: A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Act (IDEA)).

21. The IDEA is clear that the Child Find obligation is broad, extending not only to children who present themselves as having a disability, but also to children "who are ***suspected*** of being a child with a disability . . . and in need of special education." 34 C.F.R. § 300.111(c)(1).

22. The Fourth Circuit has not established a clear test for determining precisely when Child Find is triggered under the "suspected of being a child with a disability" language in 34 C.F.R. § 300.111(c)(1).

23. Three different tests were proposed in this appeal.

24. The Sixth Circuit test to determine whether a school system violated Child Find by failing to evaluate a child with a suspected disability "provides that the claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for deciding not to evaluate." *Board of Educ. Of Fayette County v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007) (internal quotations and citations omitted).

25. The Ninth Circuit test to determine whether a school system violated Child Find by failing to evaluate a child with a suspected disability "establishes that a disability is 'suspected,' and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. …[F]or example, we held that the 'informed suspicions of parents, who may have consulted outside experts,' trigger the requirement to assess, even if the school district disagrees with the parent's suspicions." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016) (internal quotations and citations omitted).

26. In other words, under the Ninth Circuit test, "if a school district is on notice that a child *may* have a particular disorder, it *must* assess that child for that disorder, regardless of the subjective

views of its staff members concerning the likely outcome of such an assessment." *Id.* (emphasis added to the word "may;" emphasis in original on the word "must").

27. As an alternative to the Sixth and Ninth Circuit tests, Respondent proposed that a child is "suspected" of having a disability only when the school system has "knowledge" that the child *is* a child with a disability such that the school system would be "deemed to have knowledge" for purposes of imposing particular disciplinary sanctions against the child under 20 U.S.C. § 1415(k)(5).

28. In North Carolina in evaluating Petitioners' claim against a local board of education, "the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show to the contrary." N.C. Gen. Stat. § 115C-44(b).

29. Additionally, in reviewing record evidence as measured against the standards set in the IDEA, Review Officers may *not* "substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

30. Under the limited record evidence in this appeal, given the deference owed to Respondent's educational decisions, regardless of the Child Find test employed, Respondent was not in violation of Child Find through the date the Petition for a Contested Case Hearing was filed in this matter.

31. No other IDEA issue other than whether Respondent violated Child Find between February 2017 and February 2018, and specifically no issue regarding whether Respondent's eventual evaluation and eligibility determination complied with the requirements of the IDEA, was raised before the undersigned. The undersigned makes no finding and reaches no conclusion on any such issue.

Based on the foregoing Findings of Fact and Conclusion of Law, the undersigned Hearing Review Officer for the North Carolina Board of Education makes the following:

DECISION

Respondent's Formal Submission of Motion to Dismiss Appeal and Petition to State Review Officer is **DENIED**, and the FINAL DECISION GRANTING SUMMARY JUDGMENT issued by Administrative Law Judge Selina Malherbe on 1 May 2018, is **AFFIRMED**.

NOTICE

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in N.C. Gen. Stat. § 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. § 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

This the 5th day of July, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer

CERTIFICATE OF SERVICE

The foregoing DECISION was served on the Petitioner and the Respondent by **E-mail and ordinary U.S. Mail**, addressed as follows:

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The foregoing DECISION was served on the Petitioners, North Carolina Department of Public Instruction, Dispute Resolution Consultant, Office of Administrative Hearings, and the Charlotte-Mecklenburg Schools Board of Education via **ordinary U.S. mail**, addressed as follows:

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By parent or guardian Tiffany Mungo
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This the 5th day of July, 2018.

/s/ Lisa Lukasik
Lisa Lukasik
Review Officer